Supreme Court, U.S.
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No. 95-824

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In The

Supreme Court of the United States

October Term, 1995

Dianna Dair Meyer,

Petitioner,

vs.

Shearson Lehman Brothers, Inc.

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeal Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erroneously affirmed a District Court's ORDER to Compel Arbitration based on a hearing where 20th century technology, or lack thereof, was permitted to undermine judicial process resulting in an ex parte hearing and denying Plaintiff her constitutional right to due process as guaranteed by the Fifth Amendment to the Constitution of the United States of America.

2. Whether the Eleventh Circuit erroneously affirmed District Court's ORDER to Compel Arbitration in conflict with the decision of another United States Court of Appeal on the matter of voluntary vs. involuntary or mandatory arbitration argued in ***Prudential Ins. Co v. Lai*** 42 F.3d 1299 (9th Cir. 1994) and recently let stand by this Court docket 94-1923 October 3, 1995.

3. Whether this Court's opinion in ***Gilmer v. Interstate*** 114 L.Ed 2d 26 (1991) and justified at 1655 "by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration" is being enforced in the judicious spirit that this Court granted precedent.

4. If the deferred Motion to Vacate at the District Court is vacated, based on Federal Arbitration Act 9 U.S.C.Section 10 and the alleged fraudulent evidence presented by Respondents during the arbitration, conforms to the three part test used to identify fraud by ***Bonar v. Dean Witter Reynolds, Inc.,*** 835 F.2d 698 (11th Cir. 1988), will this sexual harassment, sexual discrimination, age discrimination, retaliation and constructive discharge civil rights case be sent back to arbitration or will it be sent to trial with a judge and jury.

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II. This Court's recent decision to let stand a 9th Circuit Court decision where Securities industry employees may only be forced to forgo statutory remedies and arbitrate claims if one knowingly agreed to submit such disputes to arbitration.

III. The decision and opinion of this Court in ***Gilmer v. Interstate/Johnson Lane Corp.***, 111 S.Ct. 1647 (1991) falls short of providing a fair and equitable resolution for civil rights cases through the use of arbitration.

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PETITION FOR A WRIT OF CERTIORARI

Dianna Dair Meyer respectfully petitions for a writ of certiorari to review the judgment of the Eleventh District Court of Appeal.

OPINIONS BELOW

The opinion of the U.S. District Court is not yet reported but is included as Appendix B and C. The opinion of the Eleventh Circuit Court of Appeal (Appendix A) is unreported.

STATEMENT OF JURISDICTION

The District Court entered its judgment on November 4, and November 6, 1994. The Eleventh Circuit affirmed the District Court's Orders on August 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person ...shall be deprived of life, liberty, or property, without due process of law.

CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEAL

The decision of the 9th Circuit Court of Appeal in ***Prudential Ins. Co v. Lai,*** 42 F.3d 1299, cert denied 10/3/95 SC 94-1923 which argues:

> "a Title VII plaintiff may only be forced to forgo statutory remedies and arbitrate claims if she has "knowingly" agreed to submit such disputes to arbitration."

STATEMENT OF THE CASE

This petition raises fundamental questions concerning the abuse of process by officers of the court in undermining and creating fraud on the court with the intent of forcing Petitioner, Dianna Dair Meyer, into arbitration on a matter of civil rights based on 29 U.S.C. 621 et seq (Age Discrimination in Employment Act) and 42 U.S.C. 2000 e et seq (Title VII of the Civil Rights Act) without the opportunity and ability to present

her case at a hearing to address Respondent's Motion to Compel Arbitration. Constructive fraud [1]/ were the events that led to the hearing on April 22, 1992 and the resultant fraud on the court [2] / that created the ex parte hearing. The hearing had been prearranged between the court and the attorney's of record to be a telephone conference, and the hearing was exclusively accessed by the Judge Magistrate, the attorney for one of four original Plaintiffs in this case, and the attorney for Respondent, Shearson.

Two other plaintiffs, namely, Petitioner Dianna Dair Meyer and Herman K. Golnik, Jr., while physically present at the hearing, were excluded from listening to the conversations, from responding to the arguments, or from any manner of two way dialogue or meaningful communication, because the court was unable, and did not, provide a telephone link to include them. It was an ex parte hearing, which is a violation of the 3rd Canon of Judicial Conduct. A clear error of judgment by the Judge Magistrate, who could have and should have stayed the proceedings. It was an unfair hearing, because there was an absence of one or more elements essential to due process.

A. Elements of Due Process that were lacking included notice of hearing which arrived three business days prior to the hearing, lack of legal counsel and an ex parte hearing.

The hearing took place on April 22, 1992 before Judge Magistrate Baker in the courtroom of the United States District Court Middle District of Florida in Orlando. The only events

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1 and 2 Black's Law Dictionary page 661-Sixth Edition 1990.

1. Constructive fraud consists in any act of commission or omission contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another.

2. Fraud on court is a scheme to interfere with judicial machinery performing task of impartial adjudication, as by preventing opposing party from fairly presenting his case or defense.

preceding the hearing that Petitioner Meyer was aware of included the following:

1. April 8, 1995 Nancy Donnellan (Donnellan), counsel of record at that time for Petitioner Meyer, informed Meyer that she was returning Meyer's case files and records and was also including a Stipulation to Withdraw by Donnellan as counsel of record for Meyer.

2. Meyer signed the Stipulation to Withdraw on April 13, 1992.

3. Donnellan called Meyer on April 15, 1992 wanting to know if the Stipulation to Withdraw had been signed and returned to her, and telling Meyer that there were more papers in the mail to her. The content of the package was not divulged.

4. On Friday, April 17, 1992, Meyer picked up at the local Post Office the "package of papers" that Donnellan had sent to Meyer. Included was an Order and Notice of Hearing for April 22, 1992 and a Motion to Compel Arbitration. These documents were docketed April 7 and 9, 1992 and Petitioner Meyer had no prior knowledge of their existence.

Late Friday afternoon, April 17, 1992, it was impossible to locate an attorney scheduling weekend appointments. On Monday Meyer attempted to locate an attorney who would be able to assist her. Unable to reach attorney, Jim Leone, whom she had contacted in 1991, she felt she would be held in contempt of court if she did not make an attempt to attend the hearing.

Meyer attended per the Order and was immediately confronted with the logistics problem of not having a phone line made available to her. The ex parte hearing lasted ten minutes and Meyer understood from the Judge that she was being compelled to mandatory arbitration. Nothing was forthcoming from Judge Baker or the Court until February 24, 1993 when Meyer received

Report and Recommendations and possible dismissal of her case.

In ***Powell v. Alabama***, 287 U.S. 45, 69 53 S.Ct. 55, 77 L.Ed. 158 (1932) at 170 states:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic element of the constitutional requirement of due process of law... the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

Also in ***Potashnick v. Port City Const. Co.***, 609 F.2d 1101, cert denied, 449 U.S. 820 (1980) at 1117 states:

> "The Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process....The right develops out of the principle that notice and hearing are preliminary steps essential to the passing of an enforceable judgment and that they constitute basic elements of the constitutional requirement of due process of law."

The three day period of time, that Petitioner Meyer was given to prepare, is the basis of an unfair hearing and a denial of due process. In ***Williams, Jr. v. Estelle*** 566 F. Supp. 1376 (1983) an attorney was given two and one half days to prepare for trial by a Magistrate. At 1379 it states:

> "While the Magistrate has a duty to expedite the disposition of cases and normally would be commended for doing so, the circumstances here raise a

> question as to how plaintiff's counsel could have been ready to proceed."
>
> "...his decision to force the case to trial under these circumstances, are such as to cause prejudicial error to the plaintiff's cause."

If a new trial is granted as in ***Williams v. Estelle*** in part because an attorney has only two and one half days to prepare for the hearing, it is clearly justified that a layperson with three days notice would be equally or more entitled to similar consideration. Meyer, as a layperson, had no knowledge of the legal system or processes involved. Meyer did not know the rules of the Court, and was at the total mercy of judicial and legal propriety. She, as most non-legal oriented people in such a situation, was in fear and trepidation of the unknown, which in this instance was the judicial and legal process itself. In ***Powell v. Alabama,*** 287 U.S. 45, 69 53 S.Ct. 55, 77 L.Ed. 158 (1932) at 170 states:

> "What, then, does a hearing include?...It has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

In ***Geders v. United States,*** 425 U.S. 80, 96 S.Ct. 1330 (1976) at 1335 it further confirms:

> Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

In ***Williams v. Estelle*** it was stated that " a crucial fact in this regard is that plaintiff did not move for a continuance" (one

must note that in ***Williams v. Estelle*** Plaintiff was represented by legal counsel). In the case before this Court, Meyer had no legal counsel and asking for a continuance was not a part of her vocabulary. Is it logical or fair to expect a layperson to respond t a Motion to Compel Arbitration with but three days notice? Is it logical or fair to expect a layperson to retain legal counsel with bu three days notice? Is it logical or fair to expect a layperson, or anyone for that matter, to attend a hearing out of fear of being held in contempt of court only to preside ex parte? As a layperso is this representative of normal judicial proceedings? If it is not. then three elements of due process were missing on April 22, 199. and a departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's supervisory power.

B. One may invoke the "plain error rule" in which legal impropriety has affected substantial rights, sufficiently grievous to justify notice by reviewing court and to convince it that, of itself, error possessed clear capacity to bring about unjust result.

If this were a simple matter of legal impropriety that would be one thing. Unfortunately, the events leading up to the hearing were far more than mere impropriety, or as Shearson would have you believe "complaint's are properly directed, if anywhere, at the conduct of her [Meyer's] former attorney." Shearson directed their comments away from the real issue of due process based on an absence of three specific elements (identified in A) and argued a case where a defendant, as in ***Irvin L. Young Foundation, Inc. v. Damrell,*** 607 F. Supp. 705 (D. Me. 1985), claimed that he was denied due process because he was not advised of the judicial proceedings which resulted in a default being entered against him. ***Id.*** at 708. The crux of the defendant argument was that the decedents counsel failed to protect his interests and did not keep him apprised of the progress of the suit ***Id***. The court held that while the decedent may have a cause of action against his attorney, there was no violation of the decedent

due process rights.

In the matter of Meyer's former attorney Meyer is aware that, absent responsibility and accountability, the correct avenue would be some form of sanctions applied to her via a complaint to the Florida Bar Association, but that was not Meyer's contention. What Meyer referred to, in an unschooled and unsophisticated search for the truth and justice, was the complicity which existed between Meyer's former attorney and the attorney for Shearson, which in this case led to an ex parte hearing. For Shearson's counsel to distance himself from the activities that preceded the April 22, 1992 hearing, and deposit it fully into the lap of Meyer's former counsel, is not representative of the facts presented.

Shearson's comment to the Eleventh Circuit in their reply brief "even if Ms. Meyer was denied due process, that was harmless error". To be harmless as it related to Meyer is a gross understatement. The only party to the hearing on April 22, 1992 with any potential for gain was Shearson. Their Motion to Compel Arbitration was the purpose of the hearing They have a long-standing tradition of seeking mandatory arbitration; see also ***McMahon v. Shearson,*** 107 S.Ct. 2332 (1987) setting precedent for mandatory arbitration of client claims; ***Mago v. Shearson*** 956 F.2d 932 (9th Cir 1992) setting precedent for arbitration in sex discrimination cases, ***Mastrobuono v. Shearson Lehman Hutton,*** 20 F.3d 713 (7th Cir. 1994) S.Ct.reversed No 94-18 argued January 10, 1995 - decided March 6, 1995 and seeking to apply New York punitive damage laws to arbitration.

If the purpose of the hearing was to compel arbitration, it is illogical to believe that counsel for Shearson would take it so lightly as to not even appear in person, unless they already knew they had control of the course of events, and use of the phone was nothing more than a final part of the scheme to undermine judicial process. It may have been harmless to Shearson, but it was not harmless to Meyer, it was not harmless to the professional reputation of Judge Magistrate Baker and it was not harmless to

integrity of the United States District Court Middle Division Florida in Orlando.

The issue was responsibility and accountability and whether the ex parte hearing was an element of due process. The Court and the judgment of the Judge Magistrate presiding, in this instance the United States District Court Middle Division Florida in Orlando, had the responsibility to conduct a fair and impartial hearing. Accountability must remain with the District Court, not with Meyer's former counsel. Understanding how it occurred, serves to address any impropriety with the methods used to manipulate the technological tools that the Court has available for its use.

Because the hearing was unfair, Petitioner Meyer is also invoking the plain error rule. In ***Williams v. Estelle***

> "considering whether an error was harmless, the Court necessarily must look to the circumstances of a particular case...The "plain error"rule should be invoked only in exceptional cases where it appears that the invocation of the rule is necessary in order to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process."

The acts leading up to the hearing were "willful". In ***Nees v. Securities and Exchange Commission,*** 414 F.2d 211 (1969) the term willful "means only that the act was a conscious, intentional action." To attempt to place the sequence of events on one person is a flawed argument. It took both counsel of record to discredit the integrity and reputation of the judicial process.

1. To say that Shearson did not know their attorney signed his name and initialed the name of Meyer's former attorney on a Joint Motion and Memorandum in Support to Schedule a Status Conference is untrue. It is on the docket 4/7/92.

2. To say that Meyer's former counsel did not know what she was doing when she Federal Expressed a letter, Stipulation to Withdraw and assorted files and records to Meyer at her place of employment is illogical. The cover letter is dated April 8, 1992 and is included on the record as Vol. 3, Doc. 70, Attachment B, Page B-23.

3. To say that Shearson did not know what they were doing when their attorney signed his name and initialed the name of Meyer's former counsel on the Motion to Compel Arbitration and the Memorandum in Support of Motion to Compel Arbitration and submitted it to the District Court is illogical. It is on the docket 4/9/92.

4. To say that Meyer's former counsel did not know what she was doing when she drafted and sent the Memorandum in Support of Nancy K. Donnellan for Leave to Withdraw is untrue. It is on the docket 4/10/92.

5. To say that Order and Notice of Hearing was granted 4/10/92 and Counsel of Record did not know is illogical. It is on the docket 4/10/92 and mailed to counsel of record.

6. To say that Meyer had the same amount of advance notification of the hearing and of the Motion to Compel Arbitration as Counsel of Record and the Court is totally false. The Certified cover letter sent by Donnellan to Meyer shows a date of 4/14/92 and is signed by Meyer's former counsel. Meyer received it on 4/17/92. (Vol. 3, Doc. 70 Attachment A, page A-1)

7. To say that neither Meyer's former counsel or Shearson's counsel were involved in a request to the Court to have a phone conference is illogical. They were both tied into the Court for the conference held April 22, 1992.

8. To say that Meyer lost the right to address the entire matter of the hearing "due to a waiver by Ms. Meyer caused by

her failure to object to the underlying Magistrate recommendation" is unjust. Counsel for Meyer was not deleted as Counsel of Record until 4/30/92 (it is on the docket). Meyer (and Golnik in his sworn affidavit) were never sent, and never received, the Report and Recommendation dated April 23, 1992 stating that "objections to R and R due by 5/7/92." Meyer never waived her right to object. She was never notified.

To be held accountable without proper notice, without legal counsel, and following an ex parte hearing without notice of the right to object, includes an abundance of events to invoke "plain error rule" in which legal impropriety has affected substantial rights. If this is standard judicial procedure then it is unfair.

> The principle of fundamental fairness is not strictly limited to those situations in which a party has suffered arguable prejudice. The principle is designed to maintain also public confidence in the administration of justice. ***United States v. Taylor,*** 648 F.2d 565 (9th Cir.), cert. denied, 454 U.S. 866, 102 S.Ct. 329, 70 L.Ed.2d 168 (1981)

C. A court trial schedule had been established by the District Court and Petitioner was unaware of any precedent that would have precluded this case from going forward per the schedule with a jury trial.

This case was originally filed as a COMPLAINT alleging discrimination in employment with demand for a jury trial on the docket 3/20/91. A scheduling order was set on 6/12/91 and shows on the docket as follows:

Discovery cutoff	2/1/92
Filing of all Motions	3/1/92
Pretrial Statement	4/1/92
Jury trial	7/6/92

On 4/3/92 the Court sent an ORDER (parties are to show cause

why there was a failure to comply with the Court's Order) to counsel of record, which clearly resulted in the blizzard of activity that led to Petitioners loss of her right to due process as described in Section A and B. Shearson's quantum leap from "law on the books" to "even if Ms. Meyer was denied due process, that was harmless error since this case would have been compelled to arbitration anyway" was incorrect then, and is so now.

Petitioner was denied due process, a constitutional right. Shearson engineered fraud on the court at the District Court of Appeal level. As a result, this case was removed from a jury trial scheduled for 7/6/92 and sent to arbitration almost two years later in March, 1994. The intent by which the Eleventh Circuit has taken in recognizing the federal policy favoring arbitration, "to relieve congestion in the courts and provide parties with a less expensive and speedier means of dispute resolution." ***Robbins v. Day,*** 954 F.2d 679, 682 (11th Cir. 1992) fails in its basic premise.

Removing this case to arbitration failed to achieve a "speedier means of dispute resolution" and served to extend an already prolonged series of legal actions (since May, 1989). Is it less expensive? The cost and expenses of legal actions are directly related to the length of time spent in achieving an end result. Being moved to arbitration required a totally new set of standards and criteria to be learned in order to be prepared to present ones case. New rules and new regulations require an additional amount of time and research. Instead of being less costly, it substantially increased Petitioner's costs and expenses. The burden thus placed upon the individual plaintiff in this case by this judicial process was to effectively remove any semblance of a level playing field and negatively exacerbate the very points upon which arbitration has been justified. Corporations exist in perpetuity, individuals do not. Delays do nothing but provide leverage for corporations.

The argument that was presented by Petitioner to the Eleventh Circuit, and never addressed by Shearson, revolved around the issue of retroactivity. Petitioner signed a U-4, the

document that the security industry uses to claim contractual obligation to mandatory arbitration. When Meyer signed the U-4 in 1987 , mandatory arbitration as it related to employee contracts, in the security industry was still being challenged. It was challenged in 1988, in 1989, in 1990 and up through May, 1991 until ***Gilmer v. Interstate/Johnson Lane Corp.***, 111 S.Ct. 1647 (1991). ***Gilmer*** established precedent for ADEA claims and ***Mago v. Shearson,*** 956 F.2d 932 (9th Cir 1992), established mandatory arbitration for sex discrimination cases.

Petitioner Meyer already had filed her complaint and had a court date before ***Gilmer*** was established as precedent. It is confusing and disruptive to those already with trial dates to begin an entirely new and revised course of activity. It seems, given the opportunity, this could have and should have been argued on a case by case basis, and there is no guarantee that it would have gone to arbitration. In ***Luddington v. Indiana Bell Telephone Co.***, 966 F.2d 225 (7th Cir. 1992) the Seventh Circuit broadened its stance on retroactivity of the 1991 Civil Rights Act holding that it could not be applied to conduct occurring before the effective dates of the statute or cases brought before the various provisions took effect. There is nothing in ***Gilmer*** that addresses retroactivity.

When this Court rendered its opinion and dissent in ***Gilmer v. Interstate/Johnson Lane Corp.***, 111 S. Ct. 1647 (1991) one of the areas or allegations was " unequal bargaining power between employers and employees". It was the decision of this Court at 1656 that

> "arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Section 2. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" Mitsubishi,

> 473 U.S., at 627, 105 S.Ct., at 3354...this claim of unequal bargaining power is best left for resolution in specific cases."

The U-4 which was signed by Petitioner and is Exhibit C of the Memorandum in Support of Motion to Compel Arbitration by Respondent was signed on October 5, 1987, the day Meyer was informed that she could return to her job, five weeks after she had been terminated without cause from her position with Shearson under a nationally sponsored Shearson Lehman Brothers Financial Consultant Trainee Program Contract. Her original contract had already been broken by Shearson on September 9, 1987 when she was fired without reason.

"To succeed on claim of duress, party must show that it was illegally compelled or coerced to act by fear of serious injury to his person, reputation, or fortune." ***Enzymes of America, Inc. v. Deloitte, Haskins & Sells,*** 523 N.W. 2d 810, 207 Mich.App. 28. Signing the U-4 on October 5, 1987 was done so under the most stressful of circumstances. "Key element in duress is state of mind of person threatened, but this is not to say that existence of choice necessarily disproves existence of duress. ***Hellenic Lines, Ltd. v. Louis Dreyfus Corp.*** 372 F.2d 753 (1967) at 757. Had Meyer been permitted to present her case at the hearing on April 22, 1992, she could have identified the duress that she experienced the day she signed her U-4. Instead, Petitioner was denied due process and a fair hearing.

D. Recent positions about mandatory arbitration have indicated judicial review and reassessment.

The ***Prudential Ins. Co v. Lai,*** 42 F.3d 1299 (9th Cir. 1994) cert. denied 10/3/95 case addresses the fact that the signing of the U-4 "may only be forced to forgo statutory remedies and arbitrate claims if she has "knowingly" agreed to submit such disputes to arbitration." There is nothing in this case that would indicate that Petitioner would have chosen arbitration had she been

provided with that as an alternative. To the contrary, since the hearing on April 22, 1992, all attempts and efforts to dispose of this matter in the secrecy and anonymity of arbitration have been forced upon Petitioner. Her rights have been violated by the very judicial and legal process that are supposed to protect her.

This Court by denying cert in the ***Prudential*** matter has indicated its concern for the process that denies a registered representative, financial consultant, account executive their statutory rights without voluntarily or knowingly consenting. At the Eleventh Circuit we addressed this case and quoted from ***Prudential***, Senator Robert Dole's statement in the Cong. Rec. S 15472, S. 15478 (Daily Ed. October 30, 1991) when discussing the Civil Rights Act of 1991 that the arbitration provision encourages arbitration only "where the parties knowingly and voluntarily elect to use these methods." Section 216 of the 1991 Civil Rights Act emphasized that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, th remedies provided by Title VII.

"This Court without overruling ***Alexander v. Gardner Denver,*** 415 U.S. 36 (1974) held that individuals may contractually agree to arbitrate employment disputes and thereby waive statutory rights to which they would otherwise be entitled." ***Gilmer v. Interstate/Johnson Lane Corp.***, 580 U.S. 20 (1991). Arbitration has been forced in this instant case, when it would appear that this Court intended it to be a voluntary, alternative forum.

The issue before the Ninth Circuit was not whether employees may ever agree to arbitrate statutory employment claims; they can. The issue is whether these particular employees entered into such a binding arbitration agreement, thereby waiving statutory court remedies otherwise available. The congressional concern that Title VII disputes be arbitrated only "where appropriate," and only when such a procedure was knowingly accepted, reflects our public policy of protecting victims of sexua

discrimination and harassment through the provisions of Title VII and analogous state statutes. See ***Alexander,*** 415 U.S. at 47. This is a policy that is at least as strong as our public policy in favor of arbitration. In the ***Prudential v. Lai*** case the Court said "even assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits."

In Petitioner's case, when Meyer was fired, it was the first example of two and one half years of ongoing harassment and discrimination. Appendix D is an exhibit that was accepted as evidence by the arbitrators during the arbitration. On a single sheet of paper it summarized the hostile work environment sexual harassment that Meyer was forced to undergo at the behest of Shearson. When she signed her U-4 on October 5, 1987, there is no rational way that she would have or could have knowingly forfeited her statutory rights, especially with the knowledge that her manager already believed he could fire her without cause.

E. The arbitration appeal process undermines Supreme Court precedent and permits distortion of Civil Rights Law.

The crux of the Motion to Vacate is knowing that vacatur of an award is virtually impossible. The Motion to Vacate in this case was filed July 19, 1994 following an award of $0 by the New York Stock Exchange arbitration panel. Appendix B is a clear, logical and well documented opinion by the Judge for this case at the United States District Court in denying the Motion to Vacate on November 4, 1994. Judge Fawsett did two remarkable things. She responded to arguments by a layperson (Petitioner proceeding pro se) and she made it clear where one must look to seek possible areas of vacatur that may, if they exist, fall within the arbitration appeal process of the Eleventh Circuit.

On November 21, 1994 Petitioner filed a request for rehearing to consider new evidence. In question was a document submitted by Shearson at the arbitration, that Petitioner alleged to

be fraudulent. The document was a handwritten "tracking sheet" created, produced and used exclusively by the Shearson Branch Manager (the alleged perpetrator of the harassment and discrimination). It was the sole piece of documentation that Shearson submitted to "prove" poor performance from 1987 through 1988. It was not listed as an exhibit prior to the arbitration, and affidavits have been submitted to the District Court verifying that many of the handwritten numbers are false including numbers that the Branch Manager had said occurred during a week when Petitioner was at a Shearson sponsored training session in Chicago, and was not even in the branch office. Because of time constraints for the appeal process, this matter has been deferred at the District Court. At this time it is unknown whether this matter will be sufficient to Vacate the Award based on 9 U.S.C. Section 10 (a) (1) Where the award was procured by corruption, fraud, or undue means.

However, the purpose of this section is to address the Motion to Vacate and how arbitration and the arbitration appeal process have served to undermine various Court and Supreme Court decisions relating to Civil Rights in this case. Petitioner moved to vacate the arbitration award based on "undue means". During the arbitration proceedings counsel for Shearson made several misstatements of law and/or fact in defining sexual harassment, retaliation and damages under Title VII.

Concentrating on the sexual harassment, Shearson stated (their closing transcript was included as Doc 63 Attachment B) "there is no basis for sexual harassment". Their assertion was that sexual harassment involved some form of sexual advances or purely sexual action. Their misstatements referred to "come-on's" and "being hit on" as that which was representative of sexual harassment. Petitioner's counsel countered with direct quotes from ***Harris v. Forklift Systems, Inc.*** 114 S.Ct. 367 (1993), ***Meritor v. Vinson*** 477 U.S. 57 (1986), ***Hall v. Gus Construction Co. Inc.,*** 842 F.2d 1010, 8th Cir (1988), ***Delgado V. Lehman,*** 665 F.Supp. 460 . E.D. Va., (1987) and ***McKinney v.***

Dole 765 F.2d 1129 (D.C. Cir. 1985) and defined hostile work environment as a form of sexual harassment relying more on "conduct that interferes with performance or creates an intimidating, hostile, or offensive working environment using a reasonable woman standard". Petitioner's counsel provided each of the arbitrators with copies of the cases after emphasizing the correct usage of hostile work environment.

The futility of this line of reasoning is that it made no difference. Even if the arbitrators understood the correct definition, the Court is not permitted to vacate on the merits of the case or for misstatements or any form of "undue means". Shearson was quick to point out in ***AG. Edwards & Sons, Inc. v. McCollough***, F.2d 1401 (9th cir. 1992) "courts should not reverse even in the face of erroneous interpretations of law." They continued to address undue means ***A.G.Edwards*** in the context of "sloppy or overzealous lawyering" as follows:

> "Offering a meritless defense, however unfortunate, is part and parcel of the business of litigation; it carries no connotation of wrongfulness or immorality. In addition, it occurs with such frequency that were the district court's rule to be adopted, the federal courts would be required to overturn arbitration awards regularly as procured by "undue means." This would be inconsistent with the extremely limited scope of judicial review of such awards."

By misleading and misstatements and half-truths Shearson successfully overturned two Supreme Court decisions and three Circuit Court Opinions that Petitioner cited, the Civil Rights Act of 1964, the Civil Rights Act of 1991 and various iterations of EEOC Guidelines that the arbitrators chose to ignore and the Courts are unable to do anything about. This is just one small example of the arbitration process that is in non-compliance with the intent of Title VII, the rules and regulations of the NYSE, the Federal Rules of Evidence and judicial precedence.

REASON FOR GRANTING THE WRIT

I. The decision of the Eleventh District Court of Appeal fails to take into account the numerous decisions of this Court with respect to "the right to the aid of counsel as a fundamental element of due process of law" and "the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice".

The Fifth Amendment to the Constitution of the United States is "due process of law". Its intent is to restrain the Federal Government from depriving any person of life, liberty, or property without due process of law. The basic elements of "due process" include:

* the right to notice
* the right to hearing
* the right to retain counsel

There also exists the plain error rule in which legal impropriety has affected substantial rights. Petitioner is requesting that this Court having reviewed the Statement of the Case (Section A and B) exercise its supervisory power over activities that have occurred in the lower Courts.

Specifically, Petitioner has been denied her right to due process through a minimal three day notice of a hearing, without counsel or sufficient time to retain counsel and attendance during a telephone conference in which Petitioner was without access to phone lines and ultimately attended an ex parte hearing. Because this hearing was scheduled to address a Motion to Compel Arbitration, it was an unfair hearing as well as a denial of due process. There was no way to participate.

Discovery of the events leading up to the ex parte hearing were not uncovered until Petitioner was in the arbitration appeal process and upon obtaining documents from the Court record, was able to reconstruct what had taken place. A miscarriage of justice

was permitted to occur through the removal of Petitioner's case from an already scheduled trial by jury into an arbitration and a subsequent delay of two additional years. Petitioner seeks the preservation of the integrity and reputation of the judicial process by rectifying this situation and remanding for the continuation of a jury trial.

II. This Court's recent decision to let stand a 9th Circuit Court decision where Securities industry employees may only be forced to forgo statutory remedies and arbitrate claims if one "knowingly" agreed to submit such disputes to arbitration.

In the October 3, 1995 decision of this Court to let stand the 9th Circuit's decision in ***Prudential Ins.Co. v. Lai,*** 42 F.3d 1299 (9th Cir. 1994) a measure of equity is being returned to the process of voluntary vs. involuntary arbitration as it relates to Civil Rights matters and employment disputes. While the Eleventh Circuit issued its ruling prior to the decision of this Court, this case and issue was properly before the Eleventh Circuit. By affirming the decision of the lower court, the Eleventh Circuit compelled an arbitration in conflict with the decision of the Ninth Circuit and this Court's cert. denied. Petitioner request this to be acknowledged and the Eleventh Circuit's decision reversed.

III. The decision and opinion of this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct/ 1647 (1991) falls short of providing a fair and equitable resolution for civil rights cases through the use of arbitration.

The subtle distinctions that manifest themselves in behavior and actions that are considered discriminatory, become lost in the application of the Federal Arbitration Act (FAA). FAA is a law that was written in 1925, long before the creation of the environment that cultivated the Civil Rights Act of 1964. To apply 1925 standards and criteria to the situations that exist today, is to discount the evolution of words or the word "bias" from what it referred to in 1925 to what it normally refers to today.

In Appendix B, which is the District Court's denial of the Motion to Vacate, Petioner had identified one of the arbitrators as sleeping 45-55% of the time during the arbitration proceedings. In order to comport with the "narrow" ways that one has available to overturn an arbitration award, the standard for "evident partiality" is so high as to not even come close to covering the types of behavior that under one law may be suspect, but under FAA are merely amusing.

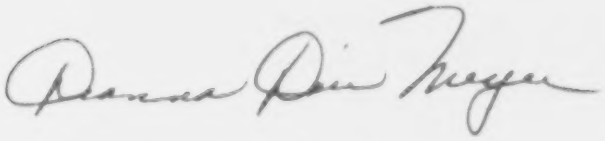
The matter of the misstatements used in Section E as it related to the term sexual harassment further illustrates the difficulty in applying law and definitions to terms that are still evolving. The subtle distinctions are what is unique and definable in Title VII claims on a case by case basis, but fail to receive their proper place under FAA. In arbitration one must educate as well as prove ones case, but do it in a simple, informal and expeditious manner. Meyer's attempt to do that was the development of a "workbook" to be used during the proceedings. Shearson requested that it be thrown out, and it was.

The list of irregularities that Petitioner Meyer experienced in the arbitration process would never be permitted in a Court of Law. As such the promise of "simplicity, informality and expedition" is nothing more than an excuse to restructure how or if Civil Rights Title VII law will be addressed in the various industries that use arbitration clauses in their licensing, employment or other contractual documents. Any semblance to truth and justice is being redefined, not by law, but by private industry.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



Dianna Dair Meyer, Pro Se

DO NOT PUBLISH

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-3494
Non-Argument Calendar

D.C. Docket No. 91-193-CIV-ORL-19

DIANNA D. MEYER,

Plaintiff-Appellant,

LINDA C. FRANK; HERMAN K. GOLNIK, JR.

Plaintiffs,

versus

SHEARSON LEHMAN BROTHERS, INC.,
fka Shearson Lehman Hutton, Inc.,

Defendant-Appellee.

Appeal from the Untied States District Court
for the Middle District of Florida

(August 29, 1995)

Before TJOFLAT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

Appellant contends that the district court erred in compelling arbitration of her claims and, following arbitration, in denying her motion to vacate the arbitration award. We find

no error; as the district court held, appellant was contractually obligated to arbitrate her claims.

AFFIRMED.

A True Copy

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO FLORIDA

DIANNA DAIR MEYER,
Plaintiff,

v. CASE NO. 91-193-CIV-ORL-

SHEARSON LEHMAN BROTHERS, INC.
Defendant,

ORDER

This case is before the Court upon Plaintiff's Motion to Modify Order (Doc. No. 62, filed September 15, 1994), Amendment A to Motion to Modify Order (Doc. No. 67, filed October 18, 1994), Defendant's Response to Plaintiff's Motion t Modify Order (Doc. No. 64, filed September 30, 1994) and Defendant's Response to Plaintiff's Second Motion to Vacate (D No. 65, filed October 6, 1994). The Court has also reconsidered Plaintiff's Motion to Vacate Award and supporting Memorandun of Law (Doc. No. 53, filed July 19, 1994), Plaintiff's Change Pa to Plaintiff's Motion to Vacate Award (Doc. No. 54, filed July 2 1994), Plaintiff's Changing Public Policy: Additions to Motion t Vacate Award (Doc. No. 59, filed August 19, 1994) and Defendant's Response to Plaintiff's Motion to Vacate (Doc. No. filed August 15, 1994).

Background [2]

This Court referred Plaintiff Dianna Dair Meyer's discrimination lawsuit against her former employer Shearson Lehman Brothers, Inc. to binding arbitration. (Doc. No. 29, filed May 13, 1992). On April 19, 1994, a three person arbitration panel from the New York Stock Exchange awarded Plaintiff $0, with "costs against Respondent." (Doc. No. 53, Exh.1). Plaintiff's first Motion to Vacate Award was filed July 19, 1994. (Doc.No.53). As grounds therefor, Plaintiff alleged: (1) the arbitration award was procured by corruption, fraud, or undue means in violation of 9 U.S.C. Section 10 (a) 2 of the Act, (3) the award was in manifest disregard of the law or arbitrary and capricious, and (4) the award was contrary to public policy. In its Order at Docket Entry 61, this Court deferred ruling on Plaintiff's Motion to Vacate Award, directed Plaintiff to file a complete transcript of the arvbitration proceedings for the Court's review, and reserved the possibility of holding an evidentiary hearing.

Plaintiff moved to modify the aforementioned Order, contending that temporal and financial constraints preclude her compliance. Plaintiff further contends, notwithstanding this Court's observation to the contrary, that "sufficient

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2 A detailed discussion of the factual allegations undeerlying the claim is unnecessary given the limited scope of review afforded the Court in the instant Case.

grounds have already been stated and justified to honor a request to vacate." Plaintiff has also filed a second motion to vacate.

The Court has carefully reviewed the case file and considered all arguments raised in support of and in opposition to the Plaintiff's motions to vacate the arbitration award. The Court now reconsiders its prior order. The nebulous nature of the Plaintiff's allegations, the particular facts of the case as alleged by the Plaintiff and the presumption against vacatur of arbitration awards persuades the Court that it is unnecessary to require the Plaintiff to submit the transcripts that the Court previously requested. Plaintiff's allegations, even if true, are legally insufficient to warrant vacatur of the arbitration award.

CONCLUSIONS OF LAW

In a formidable line of cases, the Eleventh Circuit has recognized the federal policy favoring arbitration, noting that the Federal Arbitration Act ("the Act") was enacted to relieve congestion in the courts and provide parties with a less expensive and speedier means of dispute resolution. See, e.g., Robbins V. Day, 954 F.2d 679, 682 (11th Cir. 1992), cert denied sub nom Robbins v. PaineWebber, Inc., 113 S.Ct. 201, (1992); Raiford v. Merrill Lynch,Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1991); O.R. Securities v. Professional Planning Assoc., 857 F.2d 742, 745-46 (11th Cir. 1988); accord Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332, 2337 reh. denied 108 S.Ct. 31 (1987). Accordingly, the Act

presumes that reviewing courts will confirm arbitration awards and that judicial review of the arbitration process will be severely limited. See Brown V. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 778-79 (11th Cir. 1993); Booth v. Hume Publishing Inc., 902 F. 2d 925, 932 (11th Cir. 1990).

Title 9 U.S.C. Section 10 of the Act strictly limits the situations in which vacatur is permitted. Section 10 provides in pertinent part:

> (a) In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any part to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

This statute does not permit reviewing courts to "roam unbridled

in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specified ways." Robbins 954 F. 2d at 683.

In addition to the grounds for vacatur provided in Title 9, some courts have found that an award should be vacated when the award is "arbitrary or capricious," or if enforcement of the award is contrary to public posicy. See Raiford 903 F.2d at 1412 (citation omitted); Brown, 994 F.2d at 779 (citations omitted). Only the latter two additional grounds have been recognized by the Eleventh Circuit. See Brown, 994 F.2d at 779, n3. Plaintiff has alleged that the award was in manifest disregard of the law and was contrary to public policy. She also raised two evidentiary concerns.

Corruption, Fraud or Undue Means

The Eleventh Circuit has adopted a three-part test to determine whether an arbitration award should be vacated under Title 9 U.S.C. Section 10 (a). Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988). The movant must prove: (1) the existence of fraud by clear and convincing evidence; (2) that the fraud was not discoverable upon the exercixe of due diligence peior to or during the arbitration; and (3) that the fraud materially related to an issue in the arbitration, i.e. that it deprived the party of a fair hearing, although no showing that the fraud affected the result is required. Id. (citations omitted).

Plaintiff alleges that the arbitrators' decision was procured

through fraud or undue means. She contends that the arbitration process was compromised because counsel for the Defendant allegedly made several misstatement of law and/or fact during the proceeding. Specifically, Plaintiff takes issue with the summation of Respondent's counsel which characterized hostile work environment claims as necessarily including sexual harassment. She claims that this is a critical misstatement of the law. She also contends that Defendant's counsel made misstatements relative to retalation charge and to applicable law on damages under TitleVII.

Plaintiff and her counsel were present at the hearing and presumably could have responded to the alleged misrepresentations at or near the time that they were made Plaintiff does not report whether her counsel brought the alleged misstatement to the arbitrators' attention during the hearing. However, even had the alleged misstatements occurred, gone uncorrected and been accepted by the arbitration panel, courts are generally not permitted to grant vacatur on the basis of errors of law or interpretation. Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992) cert denied 113 S. CT. 1269 (1993); O.R. Securities v. Professional Planning Association, 857 F.2d 742, 746 (11th Cir. 1988) citing Wilko v. Swan, 74 S.Ct. 182 (1953) overruled on other grounds Rodriguez de Quijas v. Shearson/American Express Inc., 109 S.Ct. 1917 (1989). This Court is not permitted to

substitute its own judgment for that of the arbitrators. See O.R. Securities v. Professional Planning Association, 857 F.2d at 747. The Court is unaware of any cases which support Plaintiff's conclusion that a misstatement of fact or law rises to the level of "undue means."

Evident Partiality or Corruption in the Arbitrators.

In Commonwealth Coatings Corp. v. Continental Casualty Co., 89 S. Ct. 337 (1968) reh. denied 89 S.Ct. 848 (1969), the Supreme Court considered the partiality of an arbitrator who had acted over a period of five years as a consultant for the prevailing party. In its ruling to set aside the arbitrator's award for evident partiality, the plurality opinion stated that arbitrators "not only must be unbiased but also must avoid even the appearance of bias." Commonwealth, 89 S.Ct. at 339-40. However, Justice White in casting the fifth vote maintained that a substantial relation must exist between the arbitrator and the party before evident partiality is established; a trivial relation is insufficient to violate 9 U.S.C. Section 10 (b). Id. at 340-41. Accord Lozano v. Maryland Cas. Co., 850 F.2d 1470, 1471 (11th Cir. 1988) cert. denied 109 S.Ct. 1136 (1989); Austin South I, Ltd. v. Barton-Malow Co., 799 F.Supp. 1135, 1141-42 (M.D. Fla. 1992);

The Eleventh Circuit has held that any conduct by a neutral arbitrator that creates a reasonable appearance of bias warrants setting aside an arbitration award on the ground of evident partiality. Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753, 758 (11th Cir. 1993) cert. denied 1994 WL 372926 (Oct. 3, 1994) (citations omitted).[3] The onus of proving facts which would establish a reasonable impression of partiality rests on the party challenging the award. Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1201 (11th Cir. 1982). Middlesex requires that the bias be "direct, definite and capable of demonstration rather than remote, uncertain and speculative. Middlesex, 675 F.2d at 1202; Lozano v. Maryland Casualty Col, 850 F.2d 1470, 1471 (11th Cir. 1988). The burden for vacating an arbitration award is heavy; the moving party must prove that the arbitrator had "a personal interest in the proceedings, whether pecuniary or otherwise, which would have biased his or her judgment in the proceedings." Austin South I,Ltd. v. Barton-Malow Co., 799 F.Supp.1135, 1142 (M.D. Fla. 1992).

In Austin South I, Ltd. v. Barton-Malow Co.,799 F.Supp. 1135 (M.D. Fla 1992), the court considered evidence similar

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[3] This appears to be an extension of the cases cited in Sunkist. See Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982) (moving party must prove facts which would establish a reasonable impression of partiality); Lozano v. Maryland Casualty Company, 859 F.2d 1470 (11th Cir. 1988) (existence of any dealings which might create an impression of possible bias that is direct, definite and capable of demonstration show evident partiality under Florida Statues)(emphasis added).

to Plaintiff's contentions in the instant case and did not find evident partiality. The Austin plaintiff submitted affidavits in support of its assertion that one of the arbitrators had exhibited bias during and after the proceedings. One affiant stated that during the proceedings he "gained the impression that [the arbitrator] was not impartial." The observer also saw the arbitrator speaking one-on-one with one of the parties. The seco affiant asserted that during the arbitration proceeding the alleged biased arbitrator "appeared to take detailed notes during [the prevailing party's] presentation, but appeared disinterested and took very few notes during [the losing party's] presentation." Th court found that these affidavits were insufficient to support a finding of partiality because they were conclusory and were not supported by any specific facts. 799 F.Supp. at 1143.

In the instant case, Plaintiff has not submitted affidavits support of her motion but contends that "[b]ased on the visual observations and one on one chats that took place during breaks, Mr. Pender [one of the three arbitrators] made his decision befor he ever walked into the arbitration." Plaintiff also maintains that

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4 It is not apparent from Plaintiff's motion whether she had the chats with the arbitrator in question or merely observed them. If the latter is the case, the Court notes that "[t]he mere fact that an arbitrator may have conversed with a party at some point during the proceedings is insufficient to establish 'evident partiality.'" Austin Stout I,Ltd. v. Barton-Malow Co., 799 F.Supp. 1135, 1143 (M.D. Fla. 1992)(Citations omitted).

Mr. Pender dozed off and was generally inattentive during the proceeding. Plaintiff further contends that the bias was heightened because, she speculates, the other arbitrators deferred to Mr. Pender because of his position as a lawyer and as the "elder 'statesman.'" These vague and speculative allegations are insufficient to support a finding of evident bias.

While Mr. Pender's alleged behavior of indulging in periodic siestas during the proceedings may have been somewhat less than professional, Plaintiff's allegations neither suggest not prove any interest, pecuniary or otherwise, that Mr. Pender may have had in the outcome of the proceeding. Therefore, Plaintiff's unsworn allegations, even if accepted by this Court as true, are insufficient as a matter of law to warrant an evidentiary hearing or to support a finding by this Court of evident partiality. See O. R. Securities, Inc. v. Professional Planning Associates, Inc., 857 F.2d 742, 746 and n.3 (11th Cir. 1988).

Manifest Disregard of the Law

Plaintiff argues that the arbitrators' decision should be vacated because it was in manifest disregard of the law. Plaintiff's argument on this point also includes the contention that the award was arbitrary and capricious. The Eleventh Circuit has not recognized manifest disregard of the law as a basis for vacating an arbitration award. Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 779 n.3 (11th Cir. 1993). Therefore, the Court will treat Plaintiff's allegations as an attack on the award on the latter

grounds.

The Eleventh Circuit has held that where no rationale is given for an arbitration award, a Court reviewing a motion to vacate the award on non-statutory grounds must look to the award itself to determine if there is a rational basis for the award. Brown, 994 F.2d at 779 (citations omitted). The Plaintiff bears the burden of refuting every rational basis upon which the arbitrators could have relied. Id. If there is a proper basis for the award, the party seeking vacatur may not invoke the non-statutory bases as grounds for vacating the award. Id. (citations omitted). Non-statutory grounds may be raised to challenge arbitration awards which are not silent as to their rationale. Id (cite omitted).

The instant arbitration award does not include a rationale for the decision. Although under Brown, it appears that Plaintiff is not entitled to challenge the award on non-statutory grounds, for sake of completeness the Court considers Plaintiff's arguments.

First, Plaintiff contends that the award was arbitrary and capricious because it failed to include any damages. It appears that Plaintiff assumed that defense counsel's discussion about limitations on damages under Title VII during the arbitration proceeding was an admission that discrimination had occurred. This assumption is improper. Arguments by counsel are neither evidence nor admissions.

Plaintiff further alleges that the award is arbitrary and capricious because a ground for the arbitrator's decision cannot be

inferred from the facts of the case. See Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992) cert denied 113 S.Ct. 1269 (1993). This argument is also without merit. A logical inference from the award is that the panel concluded that the Plaintiff failed to prove that she had been discriminated against because of her sex. Therefore, this Court cannot find that the award had no factual or legal basis.

Public Policy Considerations

In limited circumstances, public policy considerations can warrant vacatur of an arbitration award. In Delta Air Lines v. Air Line Pilots Ass'n Inter., 861 F.2d 665 (11th Cir. 1988) cert. denied 110 S.Ct. 201 (1989), the Eleventh Circuit held that an arbitrator's award which violated clearly established public policy was properly overturned by the district court. In Delta, the undisputed facts were that a Pilot-in-Command was discharged by Delta for operating a passenger aircraft while intoxicated. The arbitrators found "[i]n a confusing three-to-two opinion" that the discharge was without cause, ordered reinstatement and ordered Delta to pay for the costs of the alcohol rehabilitation program in which the pilot had asked to participate only after his discharge. Id. at 668. The district court overturned the portion of the arbitrators' decision which ordered reinstatement, finding that enforcement of the award finding no just cause for discharge would violate clearly established public policy against allowing pilots of airlines to operate aircraft while under the influence of

alcohol. The award requiring Delta to reimburse the costs of the rehabilitation program was affirmed as the court found it did not violate public policy. On appeal, citing to numerous statutes and cases condemning the practice of flying while intoxicated as proof of public policy, the Eleventh Circuit affirmed the district court's order.

In Delta and the cases cited therein, each reviewing court analyzed whether a fait accomplis was a violation of public policy. The courts did not have to consider whether or not the underlying act actually occurred. See N.L.R.B. v. Dixie Motor Coach Corp., 128 F.2d 201, 203 (5th Cir. 1942) (reinstatement to public service position of employee who drives drunk "would do violence to the public welfare and to the purposes of the National Labor Relations Act."); Iowa Electric Light and Power Co. v. Local Union 204 of the International Brotherhood of Electrical Workers, 834 F.2d 1424 (8th Cir. 1987) (reinstatement of employee who ordered opening of door system used to protect the public from exposure to harmful radiation to get to lunch more quickly would violate well defined and dominant national policy requiring strict adherence to nuclear safety rules). Furthermore, the Delta court emphasized the rarity of arbitration awards which so offend public policy that they should be set aside. 861 F. 2d at 670.

Momentarily disregarding the Eleventh Circuit's Brown prohibition on using non-statutory bases as grounds for vacatur of an award where no rationale is given, the Plaintiff's claim still

must fail. 994 F.2d at 779. Plaintiff is clearly correct that there is strong public policy against discrimination. Had the panel made the same award after having been presented with undisputed or admitted facts regarding discrimination by the defendant, a violation of public policy could be inferred. This Court understands Plaintiff's interpretation of the events in question and why she believes that the award violated public policy. However, in order to support a conclusion that the arbitration award must be vacated on public policy grounds, this Court must find that the arbitration panel failed to remedy an undisputed violation of the law. See Delta. No such finding can be made.

In the instant case, significant disagreement remains about what transpired during Ms. Meyer's employment and how the events in question are properly interpreted. Plaintiff continues to maintain that she suffered adverse treatment because of her sex, while Defendant contends that any perceived disparate treatment was performance related and not related to Plaintiff's sex.

It is not this Court's function to speculate on the weight of the evidence presented before the arbitration panel or to second guess the panel's interpretation of that evidence. A de novo review of the facts of the instant case based on one party's dissatisfaction with the award would defeat many of the public policy reasons behind arbitration. The only evidence of the arbitrators' finding that is currently before this Court is the award of $0 damages for Plaintiff and an assessment of costs against the Defendant. The

record before this Court does not support the position that the arbitrators found that the Defendant discriminated but nonetheless failed to award the Plaintiff any damages. Therefore this Court cannot overturn the award as violative of the public policy against sex discrimination.

Plaintiff also contests the mandatory nature of the arbitration and suggests the evolution of a public policy against mandatory arbitration. As evidence Plaintiff has attached a copy of Senate Bill 2012 which would amend the Civil Rights Act of 1964 and other civil rights laws to prohibit employers from requiring employees to submit claims relating to employment discrimination to mandatory arbitration. (Doc. No. 63, attachment D.) Without passing on the wisdom of proposed legislation, the Court merely notes that given the capricious nature of the legislative process, the mere fact that a piece of legislation has been filed can not be construed as dispositive proof of a change in public policy. Furthermore, predispute agreements to arbitrate claims are enforceable. See e.g., Rodriguez de Quijas v. Shearson/American Express Inc., 109 S.Ct. 1917 (1989).

Evidentiary Matters:

1. Presence of Testifying Witnesses at Hearing

Plaintiff contests the propriety of the presence of two of the Defendant's testifying witnesses in question, Gerald Helmich, Shearson Branch Manager during Ms. Meyer's tenure, and Rudy Hlavek, Shearson Regional Manager for the state of Florida, were corporate representatives. Plaintiff maintains that throughout the

testimony, the two men listened, took notes, exchanged data with their attorneys and directly quoted their own past witnesses while testifying, whereas she was allegedly told that her husband could not be present only if he was not going to be a witness.

Federal Rule of Evidence 615 provides:

> At the request of the party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Assuming arguendo that Rule 615 or an analagous rule applied to the arbitration proceeding, Plaintiff has not contended. that counsel attempted to invoke the rule of sequestration of witnesses or that any objection to the witnesses' continual presence was made at the hearing. Furthermore, at least one of the men would likely fall into a non-excludable category. In at least one case the Eleventh Circuit has held that a technical violation of the rule of sequestration may not be raised for the first time on appeal, although that case is factually dissimilar because the person's status as a testifying witness was not known at the time the rule was invoked. United States v. Beard, 775 F.2d 1577, 1580 (11th Cir. 1985) cert. denied 106 S.Ct. 1235 (1986) (courtroom deputy's testimony that defendants had switched shirts during trial

to hinder indentification was not plain error affecting substantial rights).

Further assuming that the rule was properly invoked, which Plaintiff has not alleged and Defendant specifically denies (Doc. No. 65, at 8), Plaintiff has failed to argue that she was prejudiced by the alleged violation of the rule. Absent prejudice or connivance, a violation of the rule is insufficient to warrant a vacatur. See United States v. Jimenez, 780 F.2d 975, 980 (11th Cir. 1986). Plaintiff has alleged that Mr. Hlavek and Mr. Helmich quoted from other witnesses' testimony but she did not claim that the testimony of other witnesses influenced the two men in any way other than to corroborate their own testimony. See United States v. Jimenez, 780 F.2d 975, 980 (11th Cir. 1986). And, the fact that there were two representatives rather than one is inconsequential if no harm resulted. See United States v. Faul, 748 F.2d 1204, 1221 (8th Cir. 1984) cert denied 104 S.Ct. 3500 (1985).

2. Exclusion of Evidence

Plaintiff objects to the arbitration panel's exclusion of "the book." The book was a binder entitled "Shearson Lehman's Arrogance of Power" which Plaintiff compiled for use in the case as an educational tool, a reference manual, an arbitration/litigation comparison and an outline of presentation of her case. Upon objection by the Defendant, the book was not used. Exclusion of the book does not mandate vacatur of the award. Vacatur of an

arbitrator's award for refusing to hear evidence is rare. It is appropriate only when the exclusion of relevant evidence so affects the rights of party that it may be said that he or she was deprived of a fair hearing. Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901, 763 F.2d 34, 39-40 (1st Cir. 1985). Furthermore, it is the arbitrators who are the judges of admissibility and relevancy of evidence. Id.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Vacate Award (Doc. No. 53), Plaintiff's Motion to Modify Order of 8/30/94 (Doc No.62) and Plaintiff's Second Motion to Vacate Award (Doc. No. 63.) are hereby DENIED.

DONE AND ORDERED at Orlando, Florida this 4th day of November, 1994.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
Dianna Dair Meyer
Defendant's Counsel of Record

A True Copy

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO FLORIDA

DIANNA DAIR MEYER,
Plaintiff,

v. CASE NO. 91-193-CIV-ORL-9

SHEARSON LEHMAN BROTHERS, INC.
Defendant,

ORDER

This case is before the Court on Defendant's Motion to Modify Court's Order with Respect to Case Management Report (Doc. No. 66, filed October 14, 1994) and Plaintiff's Response to Defendant's Motion to Modify Court's Order with Respect to Case Management Report (Doc. No. 70, filed November 2, 1994). Defendant is correct that the case would properly be designated as a Track One case. However, based on this Court's Order of Nov. 4, 1994, (Doc. No. 71), the motion is **DENIED AS MOOT.**

DONE AND ORDERED at Orlando, Florida this, 6th day of November, 1994.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
Dianna Dair Meyer
Defendant's Counsel of Record

A True Copy

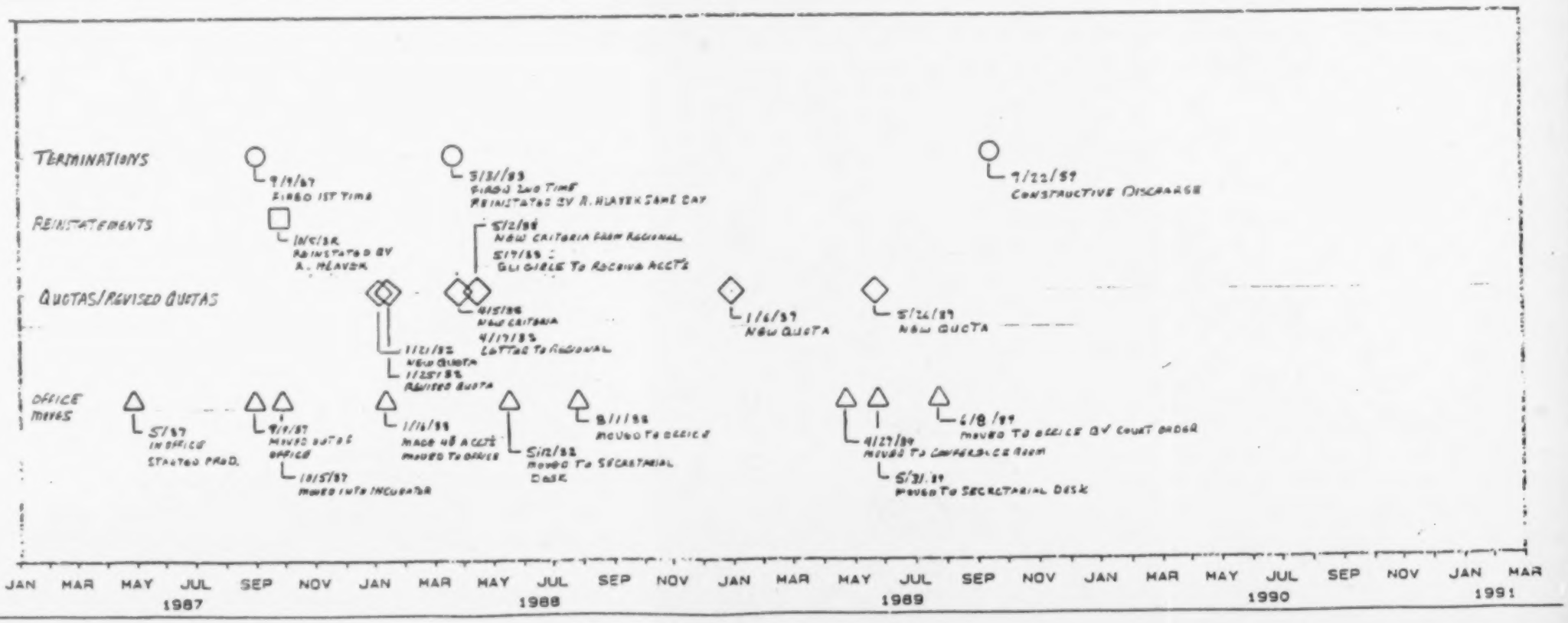
BEST AVAILABLE COPY

APPENDIX D

TIME HISTORY

SEQUENCE OF EVENTS

MAR 24, 1994
DIANNA D. MEYER



-ISTORY